82-1588
NO.

Office-Supreme Court, U.S.
FILED
MAR 25 1983
ALEXANDER L. STEVAS,
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1982

In the Matter of the Liquidation of
ALL-STAR INSURANCE CORPORATION,
a Wisconsin Corporation

RODERICK B. McNAMEE,
Special Deputy Commissioner of
Insurance of the State of Wisconsin
for the Liquidation of All-Star
Insurance Corporation,

*Appellee,*

*vs.*

LEE M. SCARBOROUGH & COMPANY,

*Appellant.*

## ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

## JURISDICTIONAL STATEMENT AND APPENDIX

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## NOTICE

Notice is given that the constitutionality of Section 645.04(5)(a), Wisconsin Statutes, is drawn in question and that 28 U.S.C. §2403 (b) may be applicable.

## QUESTIONS PRESENTED

1. Does Section 645.04(5)(a), Wisconsin Statutes, violate the guarantees of due process embodied in the Fifth and Fourteenth Amendments to the Constitution of the United States by permitting the exercise of personal jurisdiction without requiring minimum contacts with the State of Wisconsin?

2. Does Section 645.04(5)(a), Wisconsin Statutes, as applied to this appellant, deprive this appellant of due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States by permitting the exercise of personal jurisdiction without requiring minimum contacts with the State of Wisconsin?

## LIST OF PARTIES

The names of all parties to the proceeding in the Court of the State of Wisconsin are contained in the caption of the case in this Court.[1]

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[1] The proceeding in the Supreme Court of Wisconsin was consolidated with Appeal No. 81-1349, *Roderick B. McNamee, etc. v. APS Ins. Agency, Inc.* for purposes of oral argument and decision only.

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NO. ——

# In the Supreme Court of the United States

OCTOBER TERM, 1982

In the Matter of the Liquidation of
ALL-STAR INSURANCE CORPORATION,
a Wisconsin Corporation

RODERICK B. McNAMEE,
Special Deputy Commissioner of
Insurance of the State of Wisconsin
for the Liquidation of All-Star
Insurance Corporation,

*Appellee,*

*vs.*

LEE M. SCARBOROUGH & COMPANY,

*Appellant.*

## JURISDICTIONAL STATEMENT

### OPINIONS BELOW

The opinion of the Wisconsin Supreme Court is reported as IN the MATTER OF the LIQUIDATION OF ALL-STAR INSURANCE CORPORATION, a Wisconsin Corporation, Roderick B. McNAMEE, Special Deputy Commissioner of Insurance of the State of Wisconsin for the liquidation of All-Star Insurance Corporation, Plaintiff-Respondent, v. APS INSURANCE AGENCY, INC., Defendant-Appellant [Case No. 81-1349.]; IN the MATTER OF the LIQUIDATION OF ALL-STAR INSURANCE CORPORATION, a Wisconsin Corporation; Roderick B. McNAMEE, Spe-

cial Deputy Commissioner of Insurance of the State of Wisconsin for the liquidation of All-Star Insurance Corporation, Plaintiff-Respondent, v. LEE M. SCARBOROUGH & COMPANY, Defendant-Appellant [Case No. 81-1350.], 110 Wis. 2d 72, — N.W. 2d — (1983). It is reproduced as Appendix A, *Infra.*

## JURISDICTION

This is a proceeding to collect a debt allegedly due appellee from appellant under an agency contract. The judgment of the Wisconsin Supreme Court was entered on January 5, 1983. The Notice of Appeal was filed on March 4, 1983, in the Supreme Court of the State of Wisconsin and the Circuit Court of Milwaukee County, Wisconsin. This Court has jurisdiction under 28 U.S.C. §1257(2).

## CONSTITUTIONAL AND STATUTORY CITATIONS

This case involves the Fifth Amendment and Fourteenth Amendment, Section One, to the Constitution of the United States.

Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor

shall private property be taken for public use, without just compensation."

Fourteenth Amendment to the Constitution of the United States, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves Section 645.04(5)(a), Wisconsin Statutes.

"(5) PERSONAL JURISDICTION, GROUNDS FOR. In addition to other grounds for jurisdiction provided by the law of this state, a court of this state having jurisdiction of the subject matter has jurisdiction over a person served pursuant to s. 801.11 in an action brought by the receiver of a domestic insurer or an alien insurer domiciled in this state:

"(a) If the person served is obligated to the insurer in any way as an incident to any agency or brokerage arrangement that may exist or has existed between the insurer and the agent or broker, in any action on or incident to the obligation; . . ."

## STATEMENT OF THE CASE

This appeal is from a Decision of the Supreme Court of the State of Wisconsin entered on January 5, 1983, affirming the Judgment of the Milwaukee County Circuit Court entered on July 10, 1981.

This action was commenced by the Special Deputy Commissioner of Insurance for the Liquidation of All-

Star Insurance Corporation by the filing of a Summons and Complaint on July 6, 1979, wherein the plaintiff sought recovery of certain premiums, both earned and unearned and the return of unearned commissions, together with prejudgment interest. The recovery of these sums is founded upon an agency agreement entered into by All-Star Insurance and the appellant herein. The plaintiff in the Court below specifically alleged jurisdiction over the person of the appellant by virtue of Section 645.04(5)(a), Wisconsin Statutes.

The appellant is a Louisiana corporation with its principal place of business located in Metairie, Louisiana. The appellant does not have, nor ever had a place of business, property, bank deposits, telephone or registered agent in Wisconsin, nor any other contact with this State. The appellant has never solicited business nor advertised in Wisconsin, has never sent officers, agents, servants or employees to the State of Wisconsin or engaged in any business in this State.

The defendant-appellant filed and served an Answer to the Complaint on or about August 28, 1979, which specifically denied the jurisdictional allegation, raised lack of personal jurisdiction and the unconstitutionality of Section 645.04(5)(a), Wisconsin Statutes, by way of affirmative defense and moved the Court, inter alia, for an order dismissing the plaintiffs' Complaint for lack of personal jurisdiction over the appellant pursuant to Section 802.06(2)(c), Wisconsin Statutes.

The Motion to Dismiss was brought on by notice served and filed on behalf of the plaintiff-appellee and oral argument was had on November 19, 1979.

Based upon the briefs and oral arguments, the Honorable William A. Jennaro, Circuit Court Judge in and

for Milwaukee County, State of Wisconsin, rendered a decision denying the Motion to Dismiss for lack of personal jurisdiction and entered an Order to that effect on December 7, 1979. That Order was subsequently abated for purposes of deciding defendant-appellant's Motion for Stay of Proceedings pending determination of the ancilliary liquidation pending in Louisiana. The Order denying both Motions was entered on March 4, 1980.

An appeal was filed by this appellant to the Court of Appeals of the State of Wisconsin from the Order denying the Motion to Dismiss for lack of personal jurisdiction. That appeal was dismissed by Order of the Court of Appeals stating that the denial of the Motion was a nonfinal order and not appealable as of right.

The action was remitted to the Circuit Court and on March 24, 1981, the plaintiff-appellee moved for summary judgment on the Complaint which was granted on May 25, 1981, and judgment was entered in the Circuit Court on July 10, 1981. This appellant timely appealed to the Wisconsin Court of Appeals raising the aforementioned issue of lack of personal jurisdiction arguing that the Statute under which jurisdiction was asserted violated constitutional due process guarantees both as applied and on its face. The Wisconsin Court of Appeals chose to certify the question directly to the Supreme Court of the State of Wisconsin. The Supreme Court of the State of Wisconsin consolidated this action with that of APS Insurance Agency, Inc. (Wisconsin Appellate Case No. 81-1349) for purposes of oral argument.

This appeal is from the Decision of the Supreme Court of Wisconsin rendered on January 5, 1983, validating the special jurisdictional statute and its application to Lee M. Scarborough & Company.

## REASONS FOR NOTING PROBABLE JURISDICTION

### THE ISSUE OF PERSONAL JURISDICTION OVER A DEFENDANT IS AN ELEMENTAL CONSIDERATION WHICH MUST BE APPROPRIATELY ADDRESSED.

The issue of jurisdiction is of threshold importance and lays the foundation for subsequent proceedings in litigation. Even in the event the matter is taken to conclusion, as in this case, the judgment rendered may be declared void in light of the absence of jurisdiction over the defendant in the first instance. *Hanson v. Denckla,* 357 U.S. 235, 78 SC 1228, 2 LE 2d 1283 (1958); *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 100 SC 559, 62 LE 2d 490 (1980).

This appellant has contended throughout this proceeding that the exercise of jurisdiction pursuant to Section 645.04 (5) (a), Wisconsin Statutes, the special jurisdictional statute enacted for the purpose of dealing with insurer liquidations was overbroad and deprived the appellant of due process. The Statute requires a foreign defendant to appear and defend in Wisconsin courts under circumstances which would be prohibited in any other civil case for an action on a contract or debt collection. The Statute allows for the exercise of jurisdiction as a result of any agency or brokerage contract entered into at any time, anywhere, regardless of where negotiated, executed or to be performed. The only requirement for the exercise of jurisdiction is that the defunct insurer be located within the State of Wisconsin and have entered into an agency or brokerage agreement with the defendant at one time or another.

This appellant submits that to allow the judgment to stand in this case would sanction the exercise of personal jurisdiction by the State of Wisconsin under circumstances which would fly in the face of all due process considerations, fairness and reasonableness. It would permit the Wisconsin courts to ignore the concept of interstate federalism which has been affirmed and reaffirmed by this Court on numerous occasions from the time of *International Shoe Co. v. Washington,* 326 U.S. 310, 66 SC 154, 90 LE 95 (1945), through *World-Wide Volkswagen.* Section 645.04(5)(a), Wisconsin Statutes fails to provide the protections against assertion of personal jurisdiction without the requisite minimum contacts as required by *International Shoe* which, of constitutional necessity, must be inherent in the Statute for the appropriate exercise of personal jurisdiction over a nonresident defendant.

## THE RELIANCE OF THE SUPREME COURT OF WISCONSIN ON *McGEE v. INTERNATIONAL LIFE INS. CO.* AND THE FACTUAL ASSUMPTIONS UPON WHICH THE COURT BASED ITS DECISION WERE INAPPROPRIATE.

### 1. This case is not controlled by *McGee* and the underlying considerations present in that case are absent in the action before this Court.

The emphasis of the Wisconsin Court's decision was placed upon the oft-cited but narrowly construed case of *McGee v. International Life Ins. Co.,* 355 U.S. 220, 78 SC 199, 2 LE 223 (1957) and the highly regulated nature of the insurance industry. That case dealt exclusively with an action by an individual insured against a foreign insurance corporation in a suit on a policy of

insurance. Despite the fact that All-Star is an insurer in liquidation and Scarborough is an insurance agent does not put this action within the purview of the *McGee* decision. This case presents solely an action on an agency contract — not an insurance policy. It is an action to collect on an open account and, as with any other such action, due process requires the creditor to collect the debt where the debtor can be found or has contacts. The interest of California in providing a forum for its citizens with small or moderate claims in *McGee* cannot be analogized to the situation existing between All-Star and Scarborough. The Wisconsin Legislature provided All-Star with multiple avenues of collection of a quite substantial claim within the defendant's forum state, none of which would have interfered with the orderly and efficient liquidation of All-Star.[1]

The Wisconsin Court supposes that Wisconsin's "interest is even more compelling than in *McGee* because the plaintiff represents numerous Wisconsin residents." *In re Liquidation of All-Star,* 110 Wis. 2d 72, 83, 327 N.W. 2d 648 (1983). However, appellant would point out that nothing in the record supports that proposition, nor is there anything to support the conclusion that numerous contacts of any sort were made between the plaintiff and defendant. The only evidence submitted at the trial level on the issue of personal jurisdiction was the Affidavit of the appellant indicating a total lack of contact with the forum State.

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[1] The Wisconsin Statutes incorporate the Uniform Insurer's Liquidation Act which has been adopted by 30 other States, including Louisiana. Both Statutes provide for the corresponding relief between a foreign insurance company and agents within a reciprocal State. Section 645.84, Wisconsin Statutes.

The "manifest interest" advocated by the appellee and espoused by the Wisconsin Courts is not comparable to the interests discussed in *McGee* or any other case relating to an action on an insurance contract. Rather, the only interest of the State of Wisconsin is that of providing a collection mechanism for an insurer in financially troubled circumstances. The Statute attempts to accomplish by special legislation that which cannot be accomplished by a statute of appropriate breadth.

This precise issue was addressed at length in *Capitol Indemnity Corp. v. Certain Lloyd's Underwriters,* 487 F. Supp. 1115 (W.D. Wis. 1980) which succinctly illustrated the distinction between *McGee* and a case such as that presently before this Court. Again, discussing a contract dispute between two insurers, the Federal District Court found that *McGee* was "unhelpful" because ". . . that case was based in large part on the special nature of insurance which gives a state a strong interest in providing its citizen *policyholders* with a forum." *Id.* at 1191 (emphasis supplied). This is simply not the case.

Regardless of convenience of proof, as suggested by the Wisconsin Court, and regardless of an interest in the allegedly more efficient and expeditious liquidation of an insurer, the courts and the Legislature cannot inappropriately and indiscriminately require any agent or broker to come into the State to defend an action without the requisite significant contacts.

> "Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process

> Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." *World-Wide Volkswagen, supra,* at page 294.

The regulation of insurance and the interest of a State in providing a collection mechanism for an insurer is distinguishable and must be set apart from an action by a policyholder against an insurer. This is merely an action by a representative of the insurer against an agent on an open account. The compelling State interest is absent and the Statute is violative of due process both on its face and as applied to a foreign defendant who has no significant contacts with the forum.

**2. Section 645.04(5)(a), Wisconsin Statutes, misidentifies and misplaces the type of contacts which must exist for the appropriate exercise of jurisdiction.**

The judicial criteria required for conformity with Constitutional guarantees of due process has become axiomatic in the interpretation of jurisdictional disputes. The hallmark case of *International Shoe* laid down the "minimum contacts requirement" which endures to the present day, maintaining the assurance of federalism among the states. However, the contacts which the Statute deems relevant and the Wisconsin Court espouses for purposes of validation of the State's jurisdictional reach misalign the requirements laid down in *International Shoe.* Both the Statute and the Court's decision fail to consider the absence of the defendant's contacts with the forum and instead concentrate on the plaintiff's contacts. This has been and remains an impermissible basis for jurisdiction. *World-Wide Volkswagen; Hanson; Rush v. Savchuk,* 444 U.S. 320, 100 SC 571, 62 LE 2d 516 (1980).

There is ample authority for appellant's position in case law which closely parallels the factual issue before this Court. *Lakeside Bridge & Steel Co. v. Mountain State Construction Co., Inc.*, 597 F. 2d 596 (7th Cir. 1979); *Jadair, Inc. v. Walt Keeler Co., Inc.*, 508 F. Supp. 879 (E.D. Wis., 1981); *SED, Inc. v. Bohager/ Goodhues, Inc.*, 538 F. Supp. 196 (E.D. Wis., 1982). Each case, whether discussing a statute generally or a defendant specifically, requires the existence of and emphasis on the defendant's contacts with the *forum*, and not his contacts with the plaintiff or the plaintiff's contact with the State.

The Wisconsin Court attempts to characterize the action between All-Star and Scarborough as an action by the "representative of the state of Wisconsin" for the purpose of protecting "Wisconsin residents who have claims or an interest in All-Star." *In re Liquidation of All-Star*, at page 84. This is an inappropriate and incorrect characterization.

The legislatively defined purpose behind the Chapter concerning insurer liquidations is to "protect the interests of insureds, creditors and the public generally . . ." Section 645.01(4), Wisconsin Statutes; *In re Liquidation of All-Star*, at page 81. Nowhere does the Statute provide for the specific protection of Wisconsin residents and, indeed, there is absolutely no evidence to support the proposition that any Wisconsin resident would be harmed or suffer damage if Scarborough was not brought into Wisconsin courts. Rather, effective redress is guaranteed by the Uniform Insurers Liquidation Act and ancillary or reciprocal proceedings can be utilized by the creditor in the state of residence or place where jurisdiction can be appropriately asserted over the defend-

ant. Further, there is no evidence that any of the insureds or creditors of the corporation are located in Wisconsin.

The basis of the lawsuit is an agency contract — a contract between All-Star and Scarborough, not the Deputy Commissioner of Insurance. This is precisely the situation presented to the Seventh Circuit Court of Appeals and Federal District Court for the Eastern District of Wisconsin in *Lakeside* and *Jadair*. In both cases, the single contract, without more, was insufficient to confer jurisdiction.

In addition, the Wisconsin Court deems significant the fact that Scarborough acted as an agent for All-Star for four years. *In re Liquidation of All-Star,* at page 83. However, the period of time over which the contract extended is of no significance for purposes of determination of a defendant's contacts with the forum state. In *Afram v. Balfour, Maclaine, Inc.,* 63 Wis. 2d 702, 218 N.W. 2d 288 (1974), the defendant, a New York resident, had maintained and supervised a margin account for the plaintiff for four years. In that decision, the Wisconsin Court acknowledged that "to assume jurisdiction under that state of the record would clearly offend traditional notions of fair play and substantial justice." *Id.* at pages 713-714.

Finally, even if the Court were to confer a special interest or significance to this action because an insurer is involved, the decision of *SED, Inc.* should disspell any questions concerning the impact that such a determination should have on personal jurisdiction considerations. In the *SED* case, both plaintiff and defendant were engaged in a highly regulated industry supervised by both

Federal and state agencies concerning the disposal of toxic wastes. The Seventh Circuit held,

> Such supervision is a unilateral contact by the plaintiff with the forum state; it in no way demonstrates a purposeful invocation by the defendant of the benefits of the state of Wisconsin.
>
> "Finally, the interest of Wisconsin in the adjudication of this commercial contract dispute, even though it involves a regulated firm, is not sufficient to outweigh the significant policy matters that have fostered the personal jurisdiction rules (citation omitted)." *Id.* at p. 199.

The Statute under consideration erroneously allows the exercise of jurisdiction over the defendant based upon the contacts between the plaintiff and the State and not the defendant and the State. This cannot be condoned and the determination of the defendant's due process rights cannot be made based upon the plaintiff's contact with the forum.

## CONCLUSION

The Statute under which Wisconsin seeks to assert jurisdiction over a nonresident defendant fails to provide the requisite guarantees of fair play and substantial justice laid down in *International Shoe*. Further, the record does not support an inference of minimum contacts between the defendant and the forum. No compelling State interest is available for the assertion of jurisdiction under the contract which provides the foundation for this lawsuit. Therefore, the issue which will be presented to this Court for resolution addresses the violation of the intrinsic rights of the defendant to due process guaranteed by the Constitution protecting a

foreign defendant from defending an action in a distant state. As such, appellant respectfully submits that the issues for resolution are so substantial as to require the Court's consideration.

*Respectfully submitted,*

KLUWIN, DUNPHY, HANKIN AND MCNULTY

By: .....
Michael J. Pfau

By: .....
Christine K. Ohm
*Attorneys for Appellant*

# APPENDIX

## APPENDIX A

IN the MATTER OF the LIQUIDATION OF ALL-STAR INSURANCE CORPORATION, a Wisconsin Corporation,

RODERICK B. McNAMEE, Special Deputy Commissioner of Insurance of the State of Wisconsin for the liquidation of All-Star Insurance Corporation, Plaintiff-Respondent,

v.

APS INSURANCE AGENCY, INC., Defendant-Appellant. [Case No. 81-1349.]

IN the MATTER OF the LIQUIDATION OF ALL-STAR INSURANCE CORPORATION, a Wisconsin Corporation,

RODERICK B. McNAMEE, Special Deputy Commissioner of Insurance of the State of Wisconsin for the liquidation of All-Star Insurance Corporation, Plaintiff-Respondent,

v.

LEE M. SCARBOROUGH & COMPANY, Defendant-Appellant. [Case No. 81-1350.]

Supreme Court

Nos. 81-1349, 81-1350. Argued December 1, 1982.—Decided January 5, 1983.

(On certification from court of appeals.)

APPEALS from judgments of the circuit court for Milwaukee county: WILLIAM A. JENNARO, Circuit Judge. *Affirmed.*

For the appellant there were briefs by *Maurice J. McSweeney, Michael A. Bowen and Foley & Lardner,* Milwaukee, and oral argument by *Mr. Bowen.* [Case No. 81-1349.]

For the respondent there was a brief by *Matthew J. Flynn, John A. Rothstein, James A. Urdan* and *Quarles & Brady,* Milwaukee, and oral argument by *Mr. Flynn.* [Case No. 81-1349.]

For the appellant there were briefs by *Christine K. Ohm, Michael J. Pfau* and *Kluwin, Dunphy, Hankin & McNulty,* Milwaukee, and oral argument by *Ms. Ohm.* [Case No. 81-1350.]

For the respondent there was a brief by *Matthew J. Flynn, John A. Rothstein, James A. Urdan* and *Quarles & Brady,* Milwaukee, and oral argument by *Mr. Flynn.* [Case No. 81-1350.]

BEILFUSS, C. J. This is an appeal from judgments entered based upon orders granting summary judgment in favor of the plaintiff in two actions which were consolidated before the circuit court and for purposes of appeal.

These appeals arise out of the liquidation of the All-Star Insurance Corporation. All-Star, a Wisconsin corporation formerly engaged in the business of insurance, was ordered into liquidation on March 1, 1977, pursuant to ch. 645, Stats. 1977. The plaintiff, Roderick B. McNamee was appointed Special Deputy Commissioner of Insurance for the purposes of All-Star's liquidation. In this capacity, the plaintiff commenced these actions against the defendants, APS Insurance Agency, Inc. (APS) and Lee M. Scarborough & Company (Scarborough), to recover sums allegedly due under separate

agencies contracts between the two defendants and All-Star.[1]

Both defendants separately entered into agency agreements with All-Star and served as agents soliciting applications for insurance for All-Star pursuant to these agreements. APS is an Illinois corporation and entered into an agency contract with All-Star on June 1, 1973. APS's relationship with All-Star began at All-Star's initiation, when All-Star asked APS to serve as its agent. In October, 1975 APS stopped serving as All-Star's agent pursuant to an order from the Illinois Insurance Commissioner. Scarborough is a Louisiana corporation and entered into its agency contract with All-Star on April 18, 1973. It appears that the agency agreement was in effect until the time All-Star was ordered into liquidation, but the record is not entirely clear on this point.

The only contacts either defendant ever had with Wisconsin were their respective agency contracts with All-Star and their actions incident to those contracts. Neither defendant is licensed to do business in Wisconsin. The defendants have no place of business, office, property, mailing address, telephone listing, bank account nor any agents or employees in the state. Neither defendant has engaged in any business in the state, nor has authorized any agent or employee to transact business in Wisconsin. All the contacts between the defendants and All-Star pursuant to the agency contracts occurred outside of Wisconsin or by interstate mail or telephone.

In 1979 the plaintiff commenced these actions against the defendants to recover unpaid premium and unearned

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[1] These actions are two of many commenced by the liquidator against allegedly nonpaying agents.

commissions allegedly owed to All-Star under the contracts. Both defendants moved to dismiss the complaints for lack of personal jurisdiction. The trial court consolidated the cases for the hearing on the merits of the motions.

The trial court denied the motions finding personal jurisdiction pursuant to sec. 645.04(5)(a), Stats. The court rejected the defendants' contention that the exercise of personal jurisdiction pursuant to this statute was unconsitutional. The court held that the Supreme Court's decision in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), allowed the exercise of personal jurisdiction pursuant to such a special jurisdictional statute primarily because of the regulated nature of the insurance industry.

The trial court subsequently entered summary judgment in favor of the plaintiff on the merits of the actions as to both defendants. APS appealed both the personal jurisdiction issue and the determination on the merits. Scarborough appealed only as to the issue of personal jurisdiction. We accepted the appeal on certification from the court of appeals.

The issue on review is whether a Wisconsin court may constitutionally exercise jurisdiction over the defendants pursuant to sec. 645.04(5)(a), Stats. We hold that the assertion of jurisdiction pursuant to this statute does not violate due process.

[1]

The determination of whether Wisconsin courts have jurisdiction over a nonresident defendant is a two-step process. First, it must be determined whether the defendants' contacts with Wisconsin subject them to jurisdic-

tion under a Wisconsin long arm statute. If so, then the court must determine whether the exercise of jurisdiction under the statute comports with due process requirements. *Hasley v. Black, Sivalls & Bryson, Inc.*, 70 Wis. 2d 562, 575, 235 N.W.2d 446 (1975); *Zerbel v. H. L. Federman & Co.*, 48 Wis. 2d 54, 60, 179 N.W.2d 872 (1970).[2]

Because this case arises out of the liquidation of All-Star, jurisdiction over the defendants is asserted under sec. 654.04(5)(a), Stats., which provides:

"(5) PERSONAL JURISDICTION, GROUNDS FOR. In addition to other grounds for jurisdiction provided by the law of this state, a court of this state having jurisdiction of the subject matter has jurisdiction over a person served pursuant to s. 801.11 in an action brought by the receiver of a domestic insurer or an alien insurer domiciled in this state:

"(a) If the person served is obligated to the insurer in any way as an incident to any agency or brokerage arrangement that may exist or has existed between the insurer and the agent or broker, in any action on or incident to the obligation;"

This statute is a special jurisdictional statute applicable in liquidation proceedings under ch. 645, Stats. The statute allows the exercise of jurisdiction over any person who is obligated to a Wisconsin insurer involved in a ch. 645 proceeding, incident to an agency or brokerage

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[2] But see *Lincoln v. Seawright*, 104 Wis. 2d 4, 10, 310 N.W.2d 596 (1981) and cases cited therein for the presumption of due process when sec. 801.05, Stats., the general long-arm statute, is complied with. We deal here with sec. 645.04(5)(a) which has a somewhat different origin and different concern.

agreement.[3] Both defendants concede that the language of sec. 645.04(5)(a) covers their situation. Thus, the only issue before this court is whether the exercise of jurisdiction pursuant to this statute is constitutional.

[2-4]

The fourteenth amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 291 (1980). A state court may exercise jurisdiction over a nonresident if "minimum contacts" exist between the defendant and the forum such that the assertion of jurisdiction is consistent with " 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945), quoting *Milliken v. Meyer,* 311 U.S. 457, 463 (1940). Physical presence is not required; the defendant need only act indirectly in the state. *Wisconsin Electrical Manufacturing Co., Inc. v. Pennant Products, Inc.,* 619 F.2d 676, 678 n 6 (7th Cir. 1980). The relationship between the defendant and the forum must be such that it is reasonable and fair to require the defendant to defend the particular suit in the particular forum. *World-Wide Volkswagen,* 444 U.S. at 564. Thus, the touchstone of the exercise of jurisdiction is reasonableness and fairness.

The defendants contend that the exercise of jurisdiction in these actions violates due process. They assert that the statute is unconstitutional on its face because it

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[3] Four other states have adopted a similar jurisdiction statute. Idaho Code Sec. 41-3304 (Supp. 1981); Ky. Rev. Stat. Sec. 304.33-040 (1981); Mont. Code Ann. Sec. 33-2-1306 (1981); Nev. Rev. Stat. Sec. 696 B. 200 (1980).

allows the exercise of jurisdiction without requiring even a single isolated contact with Wisconsin. They further contend that the statute, as applied, is unconstitutional because it allows the exercise of jurisdiction where the nonresident's only contact with the state is a contract with a Wisconsin plaintiff. We believe that under the decision in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) both these arguments fail.

*McGee* involved a suit instituted in California by the beneficiary of a life insurance policy against the Texas insurance company which denied coverage. The only contacts between the insurer and California were the mailing of a reinsurance certificate to the insured in California and the policyholder's payment of the premiums by mail. The court found that due process was not violated by the exercise of jurisdiction based on these minimal contacts finding that "[i]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State." 355 U.S. at 223. The court reasoned:

"The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum — thus in effect making the company judgment proof. Often the crucial witnesses—as here on the company's defense of suicide—will be found in the insured's locality. Of course, there may be inconvenience to the insurer if it is held amenable

to suit in California where it had this contract but certainly nothing which amounts to a denial of due process. *Cf. Travelers Health Assn. v. Virginia ex rel. State Corporation Comm'n,* 339 N.S. 643. There is no contention that respondent did not have adequate notice of the suit or sufficient time to prepare its defenses and appear." 355 U.S. 223-24.

This court as well as the United States Supreme Court have both recognized that *McGee* is based on the principle that states have a strong interest in providing their citizens with a forum in insurance disputes. This court in *Nagel v. Crain Cutter Co.,* 50 Wis. 2d 638, 649-50, 184 N.W.2d 876 (1971) stated:

"For example, in *McGee v. International Life Ins. Co.,* the state had a special interest in 'providing effective means of redress for its residents when their insurers refuse to pay claims.' To effectuate its public policy, California enacted a statute specifically holding nonresident insurers amenable to the jurisdiction of California courts. *The special public interest of the individual states in the insurance industry is well recognized.* . . . While public interest is not enough, in and of itself, to constitutionally justify the exercise of personal jurisdiction over a foreign defendant, this court has indicated that it is a factor of some significance." (Emphasis supplied).

And as stated by the United States Supreme Court in *Hanson v. Denckla,* 357 U.S. 235, 252 (1958) in distinguishing *McGee:*

"This case is also different from *McGee* in that there the State had enacted special legislation (Unauthorized Insurers Process Act) to exercise what *McGee* called its 'manifest interest' in providing effective redress for citizens who had been injured by nonresidents engaged in an activity that the State treats as exceptional and subjects to special regulation."

Thus, where the state's interest in "providing effective means of redress for its residents" is strong, as in the highly regulated area of insurance, the minimum contacts requirements of *International Shoe* can be met through a single isolated contract. *Zerbel,* 48 Wis. 2d at 69.

There is some controversy as to whether *McGee* was limited by the decision in *Hanson v. Denckla,* 357 U.S. 235 (1958), decided the same term as *McGee.*[4] However, both the United States Supreme Court and this court have recognized the continuing validity of the *McGee* decision. In *Hasley v. Black, Sivalls & Bryson, Inc.,* 70 Wis. 2d at 583, this court examined both *McGee* and *Hanson* and found that the *Hanson* decision "did acknowledge the correctness of *McGee.*" The court went on to distinguish *Hanson* from *McGee* and stated: "*Hanson* is best viewed as an application of the due process standard to a particular factual situation." *Id.* More importantly, recent United States Supreme Court decisions have reaffirmed the continuing validity of *McGee.* See, *Rush v. Savchuk,* 444 U.S. 320, 333 (1980); *World-Wide Volkswagen v. Woodson,* 444 U.S. 286, 292-93 (1980); *Kulko v. California Superior Court,* 436 U.S. 84, 98 (1978).

We find that the *McGee* decision is applicable and controlling in this case. This case arises out of liquidation proceedings instituted pursuant to ch. 645, Stats. Ch. 645

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[4] This controversy surrounds the effect of the following statements in *Hanson:*

"[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." 357 U.S. at 253.

For a detailed discussion of the effect of this language see, *Zerbel,* 48 Wis. 2d at 60-62.

was enacted in 1967 as the product of a comprehensive study and revision of the insurance laws and redesigned all aspects of insurance deliquency proceedings.[5] It sets up a comprehensive framework for the complete, orderly and efficient liquidation of insolvent Wisconsin insurance companies in order to fairly distribute the unavoidable burden of deliquency.[6] The purposes are more explicitly stated in sec. 645.01(4), which provides:

"(4) PURPOSE. The purpose of this chapter is the protection of the interests of insureds, creditors, and the public generally, with minimum interference with the normal prerogatives of proprietors, through:

"(a) Early detection of any potentially dangerous condition in an insurer, and prompt application of appropriate corrective measures, neither unduly harsh nor subject to the kind of publicity that would needlessly damage or destroy the insurer;

"(b) Improved methods for rehabilitating insurers, by enlisting the advice and management expertise of the insurance industry;

"(c) Enhanced efficiency and economy of liquidation, through clarification and specification of the law, to minimize legal uncertainty and litigation;

"(d) Equitable apportionment of any unavoidable loss;

"(e) Lessening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the liquidation process, and by extension of the scope of personal jurisdiction over debtors of the insurer outside this state; and

"(f) Regulation of the insurance business by the impact of the law relating to delinquency procedures and substantive rules on the entire insurance business."

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[5] 1967 Committee Comment accompanying ch. 647, W.S.A. at 400.

[6] *Id.* at 401.

The chapter is based substantially on the Uniform Insurers Liquidation Act which is integrated into ch. 645, Stats., and "both modified and extended to assure more efficient regulation of interstate delinquency problems."[7] Over thirty other states have also adopted the Uniform Act.[8]

As part of this chapter the legislature enacted sec. 645.04(5)(a), Stats., which allows Wisconsin courts to obtain jurisdiction over nonresident agents and brokers in order to efficiently and inexpensively gather up the outstanding assets of the insolvent insurer. As stated in the interpretative commentary accompanying sec. 645.04 (5):

"Sub. (5): This subsection extends the jurisdiction of the Wisconsin court in order to strengthen the hand of the receiver. *In so doing, however, it still assures 'fair play and substantial justice,' (see International Shoe Co. v. Washington,* 66 S. Ct. 154, 326 U.S. 310, 316, 90 L. Ed. 95, 161 A.L.R. 1057 (1945) *to any defendants affected by this new basis of jurisdiction. When a formal delinquency proceeding begins, agents' balances are likely to constitute a large share of the insurer's assets. Moreover, they are assets difficult to collect. To facilitate gathering the funds, the Wisconsin courts are given expanded personal jurisdiction, making it easier and more economical to reduce these claims to judgment.* Of course, actual collection will still require proceedings where the defendant's assets can be found, but the full faith and credit clause and the Uniform Enforcement of Foreign Judgments Act (s. 270.46) [U.L.A.] will make that part of the task easier. The other 2 grounds for jurisdiction may be used to help undo transactions by which the insurer's assets were systematically depleted,

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[7] *Id.*, at 405.

[8] *See*, ch. 645, W.S.A. at 50 (Supp. 1982-83).

if appropriate defendants can be found. The connections between the insurer and the persons listed in this subsection are close enough that a statute giving such personal jurisdiction, for purposes of actions arising out of the relationship, satisfies the requirements of due process.

"The Uniform Insurers Liquidation Act [U.L.A.] gives the domiciliary receiver the primary right to collect agents' balances. Par. (a) facilitates his doing so when this state is the domiciliary state by providing for jurisdiction here. See s. 645.83(1) for the Uniform Act provision giving the primary right where another state is the domiciliary state." (Emphasis supplied.) Ch. 645, W.S.A. at 418.

Like California in *McGee,* Wisconsin has enacted a special jurisdictional statute which asserts the state's "manifest interest" in providing an efficient and inexpensive forum for the liquidation of Wisconsin insurers. *Cf. Kulko v. California Superior Court,* 436 U.S. at 98. The plaintiff is the special deputy appointed to liquidate All-Star. Therefore, this case involves, in substance, actions by the state of Wisconsin acting through the liquidator to protect, among others, the collective interests of Wisconsin residents who are policyholders, claimants and creditors of All-Star The state's interest is even more compelling than in *McGee* because the plaintiff represents numerous Wisconsin residents. "These residents would be at a severe disadvantage if [the plaintiff was] forced to follow [these insurance agents] to a distant State in order to hold [them] legally accountable." *McGee,* 355 U.S. at 223.

[5]

The defendants are involved in the highly regulated insurance business. They both acted as agents soliciting insurance applications which were sent to All-Star in Wisconsin. All-Star performed its part of the contract

entirely in Wisconsin. Scarborough and APS acted as agents for All-Star for four and two years, respectively. During these years the defendants made numerous phone calls to Wisconsin. Further, the contract required that the defendants send, on a monthly basis, premium payments to Wisconsin on all applications solicited by the defendants and accepted by All-Star. Thus, the two agency contracts between the defendants and All-Star had a "substantial connection" with the state of Wisconsin.

Moreover, because these actions are just two of many instituted against agents of All-Star, it is clear that most of the witnesses and evidence is located in Wisconsin. The burden and inconvenience on the defendants in having to defend in Wisconsin rather than Louisiana or Illinois is not so unreasonable that it results in a denial of due process.

The defendants rely on cases such as *Lakeside Bridge & Steel Co. v. Mountain State Construction Co., Inc.*, 597 F.2d 596 (7th Cir. 1979) and *Capitol Indem. Corp. v. Certain Lloyds Underwriters,* 487 F. Supp. 1115 (W.D. Wis. 1980), for the proposition that merely entering into a contract with a Wisconsin resident is not sufficient to confer jurisdiction. They contend that the *Lakeside*-type decisions are applicable because this is merely a contract dispute between two corporations who are involved in the insurance business. They distinguish *McGee* on the grounds that it involved an individual asserting coverage against a foreign insurer rather than a contract dispute between two corporations. We disagree.

The defendants' arguments oversimplify the posture of this case. The instant case does not involve two corporations in a contract dispute as in *Lakeside*. Rather,

as stated above, the plaintiff is the representative of the state of Wisconsin and is charged with the duty of effecting the efficient liquidation of a domestic insurance company. The purpose behind the actions instituted by the plaintiff against these defendants is to protect Wisconsin residents who have claims or an interest in All-Star. This interest, as asserted by the enactment of sec. 645.04(5)(a), Stats., and the connection of the agency contracts with the state of Wisconsin, brings this case squarely within the *McGee* decision. No similar public interest was present in the cases cited by the defendants. Rather the cases specifically distinguished *McGee* on the grounds the decision "was based in substantial part on the special nature of the business of insurance."[9] Therefore we find that they have no application to the instant case which involves basically the same public interest as in *McGee*.[10]

In conclusion, we believe that it is fair and reasonable to exercise jurisdiction over the defendants. The litigation is connected to the forum because it involves the liquidation of a Wisconsin insurer. The defendants are linked to Wisconsin by virtue of their contracts with All-Star and their actions incident to the contracts. Wisconsin has a manifest interest in providing an efficient and inexpensive forum in which to liquidate domestic insurance companies in order to protect its citizens. Finally, the burden on the defendants to defend in Wisconsin is

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[9] *Lakeside*, 597 F2d at 600; *Capitol Indemnity*, 487 F Supp. at 1119.

[10] It should also be noted that the Seventh Circuit in *Lakeside*, 597 F2d at 599, recognized the "likelihood" that this court may have decited the case differently citing to *Zerbel v. H. L. Federman & Co.*, 48 Wis. 2d 54, 179 N.W.2d 872 (1970). We express no opinion as to the correctness of the *Lakeside* decision. Instead we find that it is distinguishable from this case.

not unreasonable. Therefore we hold that the defendants are amenable to the jurisdiction of the Wisconsin courts in these actions based on their agency contracts with All-Star.

We do not reach the issues raised by APS on the merits of the trial court's grant of summary judgment in favor of All-Star. We remand these issues to the court of appeals.

*By the Court.* — Case No. 81-1349 is remanded to the court of appeals for further proceedings not inconsistent with this opinion.

Judgment affirmed in Case No. 81-1350.

ABRAHAMSON, J., took no part.

## APPENDIX B

STATE OF WISCONSIN MILWAUKEE COUNTY
CIRCUIT COURT

In the Matter of the Liquidation of
ALL-STAR INSURANCE CORPORATION,
a Wisconsin corporation

---

RODERICK B. MCNAMEE,
Special Deputy Commissioner of Insurance
of the State of Wisconsin for the Liquidation of
All-Star Insurance Corporation,

Plaintiff,

vs.

LEE M. SCARBOROUGH & COMPANY,

Defendant.

### OPINION OF TRIAL COURT

(*Argument Omitted.*)

Case No. 494-447

THE COURT: All right. Thank you. The main issue raised by the two defendants ragarding the personal jurisdiction question goes to the issue of whether the Wisconsin Statutes, §645.04(5)(a) violates due process and I'm not convinced that the long arm statute that covers insurance rehabilitation and liquidation is unconstitutional. The law in McGee I think easily allows for the type of long arm statute that we have in Wisconsin because of the very nature of the insurance industry and the very nature of the minimum contact concepts that ordinarily controls the questions of personal jurisdiction and while Lakeside may well be an excellent discussion of personal jurisdiction and minimum contacts, it is in

fact a case that does not have a particular or the particular issue of an unique long arm statute which was passed subsequent — I believe the Wisconsin statute was passed subsequent to McGee — in fact deals with the general concepts of quantity of contacts, the nature and quality of it and the source of the cause of action and the like and from the standpoint I believe that the invitation to determine that 645.04(5)(a) is unconstitutional would have to be declined. And the motion to dismiss for lack of personal jurisdiction would be denied as it relates to APS and as it relates to Lee M. Scarborough and Company. . . .

STATE OF WISCONSIN MILWAUKEE COUNTY
CIRCUIT COURT

In the Matter of the Liquidation of
ALL-STAR INSURANCE CORPORATION,
a Wisconsin corporation

---

RODERICK B. MCNAMEE,
Special Deputy Commissioner of Insurance
of the State of Wisconsin for the Liquidation of
All-Star Insurance Corporation,

Plaintiff,

vs.

LEE M. SCARBOROUGH & COMPANY,

Defendant.

AMENDED ORDER
Case No. 494-447
*(Formal Parts Omitted)*

NOW, THEREFORE, IT IS ORDERED as follows:

1. That the motion of defendant Lee M. Scarborough & Company for dismissal of the complaint against said defendant for lack of jurisdiction over its person is hereby DENIED.

2. That the motion of defendant Lee M. Scarborough & Company for a stay of the Wisconsin proceedings pending a determination in the ancillary liquidation proceedings in Louisiana is hereby DENIED.

Dated this 14th day of March, 1980.

BY THE COURT:

/s/ Wm. A. Jennaro
Honorable William A. Jennaro
Circuit Court Judge

## APPENDIX C

STATE OF WISCONSIN MILWAUKEE COUNTY
CIRCUIT COURT

In the Matter of the Liquidation of
ALL-STAR INSURANCE CORPORATION,
a Wisconsin corporation

---

RODERICK B. MCNAMEE,
Special Deputy Commissioner of Insurance
of the State of Wisconsin for the Liquidation of
All-Star Insurance Corporation,

Plaintiff,

vs.

LEE M. SCARBOROUGH & COMPANY,

Defendant.

Case No. 494-447

### JUDGMENT

The Milwaukee County Circuit Court, the Honorable William A. Jennaro presiding, having ordered entry of judgment in favor of plaintiff and against defendant in the above entitled matter,

IT IS ORDERED AND ADJUDGED that the plaintiff, Roderick B. McNamee, Special Deputy Commissioner of Insurance of the State of Wisconsin, recover of the defendant Lee M. Scarborough & Company the sum of $72,005.39, plus pre-judgment interest of $7,200.-54, plus its costs and expenses of litigation in the amount of $3,600.27, for a total amount of $82,806.20.

Dated this 10th day of July, 1981.

BY THE COURT
FRANCIS X. MCCORMACK, CLERK
By /s/
Deputy Clerk

## APPENDIX D

NO. ——

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

In the Matter of the Liquidation of
ALL-STAR INSURANCE CORPORATION,
a Wisconsin corporation

---

RODERICK B. MCNAMEE,
Special Deputy Commissioner of Insurance
of the State of Wisconsin for the Liquidation of
All-Star Insurance Corporation,

Appellee,

vs.

LEE M. SCARBOROUGH & COMPANY,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

NOTICE OF APPEAL

Notice is hereby given that Lee M. Scarborough & Company hereby appeals to the Supreme Court of the United States from the Judgment of the Supreme Court of the State of Wisconsin, Appeal No. 81-1350 entered January 5, 1983. This appeal is taken pursuant to 28 U.S.C. §1257(2).

Further notice is given that the constitutionality of Section 645.04(5)(a), Wisconsin Statutes, is drawn in question and that 28 U.S.C. §2403(b) may be applicable.

Dated at Milwaukee, Wisconsin this 3 day of March, 1983.

KLUWIN, DUNPHY, HANKIN AND MCNULTY

By: /s/ Michael J. Pfau
Michael J. Pfau

By: /s/ Christine K. Ohm
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Filed on March 4, 1983, — Circuit Court in Milwaukee County and Supreme Court of State of Wisconsin.